OAH 8-8032-31789

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE NORTH SUBURBAN COMMUNICATIONS COMMISSION

In the Matter of Comcast Cable Television Franchise Renewal Applications to Member-Cities of North Suburban Communications Commission

FOURTH PREHEARING ORDER

This matter came before Administrative Law Judge Eric L. Lipman for an oral argument on December 11, 2015. Comcast of Minnesota had earlier filed motions requesting three forms of relief. It seeks an Order from the Administrative Law Judge: (a) directing the North Suburban Communications Commission to file a more detailed Notice and Order for Hearing; (b) expanding the procedural rules that will apply in this proceeding, so as to include broader pre-hearing discovery; and (c) joinder of the local franchising authorities that are member cities of the Commission.

The hearing record on the motions closed at the end of the oral argument on December 11, 2015.

Randall Tietjen, Stephen P. Safranski, and Lisa L. Beane, Robins, Kaplan, Miller & Ciresi, LLP, appeared on behalf of Comcast of Minnesota (Comcast). John M. Baker and Katherine M. Swenson, Greene Espel, PLLP, appeared on behalf of the North Suburban Communications Commission (NSCC).

Based upon the submissions of the parties and the contents of the record,

IT IS HEREBY ORDERED:

1. Comcast's Motion for an Order directing the filing of a revised Notice and Order for Hearing is **DENIED**.

2. Comcast's Motion to provide for additional prehearing discovery is **DENIED**.

3. Comcast's Motion to provide for subpoenas compelling the attendance of witnesses at the Evidentiary Hearing is **DENIED WITHOUT PREJUDICE** to refiling.

4. Comcast's Motion to join the member cities of the NSCC as complaining parties is **DENIED**.

5. By **4:30 p.m.** on **Tuesday, January 5, 2016,** counsel for the parties shall individually, or jointly, file a short status report listing a set of mutually-convenient dates and times between January 6 and January 15, 2016, on which the parties could participate in a telephone prehearing status and scheduling conference.

6. The topic of the Prehearing Conference will be setting appropriate milestones for completion of prehearing discovery, the submission of hearing exhibits and an evidentiary hearing.

Dated: December 30, 2015

s/Eric L. Lipman

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ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

I. Factual Background

The Respondent, Comcast, operates a cable television system that serves the communities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, and St. Anthony, Minnesota (Member Cities).[1] Comcast provides cable services under municipal franchises from these cities, each of whom exercises power as a local franchising authority (LFA).[2]

The current franchise agreements were originally formed in July and August of 1998, between Comcast's predecessor, MediaOne North Central Communications, and each of NSCC's member cities.[3] In 2002, Comcast acquired the MediaOne system and its nonexclusive franchises to provide cable service.[4]

The original term of these agreements was fifteen years. The agreements were scheduled to expire in July of 2013, however, the parties negotiated an extension agreement that would provide for both an extension of performance by Comcast and some additional time for the resolution of this dispute.[5]

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[1] *See* COMCAST EXHIBITS 1-10 (Franchise Agreements with NSCC Member Cities).

[2] *See, e.g.,* COMCAST EX. 1 at 5.

[3] *See* COMCAST EXS. 1-10.

[4] *See* COMCAST EX. 18 at 1.

[5] *See, e.g.,* COMCAST EX. 12 at 1.

Since 1990, each of the cities listed above has delegated certain duties and administrative functions to a joint powers organization, the NSCC.[6] Under that set of delegations, the cable franchises have been jointly administered by the NSCC on behalf of its member cities.[7]

Formation of such joint powers entities is permitted by state law. Minn. Stat. § 238.08, subd. 5 (2014) provides that "municipalities may by ordinance or resolution create a joint cable communications commission" and "delegate authority vested in the municipality by statute or charter to prepare, adopt, grant, administer, and enforce a cable communications franchise." Exercising that authority, the member cities of NSCC delegated to the Commission the powers to:

> undertake all procedures necessary to maintain uniform rates and to handle applications for changes in rates for the services provided by the Grantee….
>
> provide for the prosecution, defense, or other participation in actions or proceedings at law in which it may have an interest, and may employ counsel for that purpose….
>
> take such action as it deems necessary, including participation and appearance in proceedings of state and federal regulatory, legislative, or administrative bodies, on any matter related to or affecting cable communication rates, franchises, or levels of service.[8]

Moreover, in 2011, the member cities of NSCC confirmed this earlier grant of authority and re-stated their expectation that the NSCC "manage and conduct those formal franchise renewal proceedings specified in 626(a)(l) of the Cable Act, 47 U.S.C. § 546(a)(l), and to take all steps and actions necessary or desired to conduct such proceedings and to comply with applicable laws, regulations, orders and decisions."[9]

Under the franchise agreements with the member cities, Comcast remits "grants" to a corporate affiliate of NSCC – the North Suburban Access Corporation (NSAC).

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[6] COMCAST EX. 16 (Joint powers agreement forming NSCC). It should be noted that at the beginning of the proceedings on the renewal of Comcast's franchise agreements, the city of Shoreview was a member community of the NSCC, but has since left the joint powers organization. The city of Shoreview has also resolved its issues with Comcast and entered into a successor agreement with it.

[7] COMCAST EX. 12 at 1.

[8] COMCAST EX. 16 at 6.

[9] COMCAST EX. 23 at 4.

With these resources, the NSAC undertakes public, educational, and government (PEG) programming on cable channels in the service areas covered by the franchises.[10]

The nature, range of supports, cost and customer demand for PEG programming during the term of any follow-on franchise agreements is at the core of the disputes between Comcast and the NSCC member cities. NSCC made a formal finding that "Comcast's Proposal fails to meet the Commission and Member Cities' future cable-related community needs and interests taking into account the cost of meeting such needs and interests."[11] For its part, Comcast regards the cities' stated requirements as "unlawful," unrelated to cable programming and "excessive."[12] This was a key reason why, notwithstanding the fact that Comcast submitted a timely proposal for renewal of its franchise agreements, the member cities made "preliminary assessments" not to renew Comcast's franchise.[13]

A. The Cable Act - 47 U.S.C. §§ 541-549 (2013)

The Cable Communications Policy Act of 1984 (the Cable Act) contemplates a three-stage renewal process.[14] In the first stage, the LFAs determine the communities' needs and evaluate the cable franchisee's performance during the term of the franchise.[15] Following this review, the LFA issues a Request for Renewal Proposal (RFRP) that is addressed to the incumbent cable operator. The incumbent operator may respond to this request by submitting a proposal for renewal of the franchise.[16] If the LFA issues "a preliminary assessment that the franchise should not be renewed," as occurred in this case, the incumbent cable operator is entitled to an administrative hearing on its renewal proposal.[17] As to the administrative proceedings, the cable operator:

> shall be afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues raised in the proceeding under [47 U.S.C. § 546 (a)]), to require the production of evidence, and to question witnesses. A transcript shall be made of any such proceeding.[18]

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[10] *See* 47 U.S.C. § 544(b)(1) (2013) ("in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), [the franchising authority] may establish requirements for facilities and equipment, but may not, except as provided in subsection (h) of this section, establish requirements for video programming or other information services").

[11] COMCAST EX. 22 at 4.

[12] COMCAST'S INITIAL MEMORANDUM OF LAW at 11-12.

[13] *Id.* at 11-14.

[14] 47 U.S.C. § 546.

[15] *See* 47 U.S.C. § 546(a)(1); Ex. 11 (memorandum of understanding).

[16] 47 U.S.C. § 546(b)(1).

[17] 47 U.S.C. § 546(c)(1), (2).

[18] 47 U.S.C. § 546(c)(2).

Following the administrative proceeding, the LFA is directed to "issue a written decision granting or denying the proposal for renewal based upon the record of such proceeding, and … [s]uch decision shall state the reasons therefor."[19]

Likewise important, the Cable Act links the renewal decision to the administrative record on four distinct, statutory criteria; specifically "whether —

> (A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;
>
> (B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;
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> (C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and
>
> (D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.[20]

If the LFA denies renewal, the cable operator may appeal the decision not to renew the franchise to "the district court of the United States for any judicial district in which the cable system is located[,] or ... any State court of general jurisdiction having jurisdiction over the parties."[21]

B. Promulgation of the Hearing Procedures

As part of its action upon the Preliminary Assessment, the cities also adopted a set of hearing procedures for the administrative proceedings required by 47 U.S.C. § 546(c)(1).[22] The procedural rules include strict limits on the demands for the production of documents and interrogatories that may be made, and a complete prohibition on depositions.[23]

Further, by way of a letter dated September 26, 2014, the NSCC stated that it would favor procedures like that used in administrative proceedings before the

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[19] 47 U.S.C. § 546(c)(3).

[20] 47 U.S.C. § 546 (c)(1)(A)-(D).

[21] 47 U.S.C. §§ 546(e), 555(a) (2014); *see also E. Telecom Corp. v. Borough of E. Conemaugh Francis Feist*, 872 F.2d 30, 34 (3d Cir. 1989).

[22] *See* Exs. 13, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49 and 53.

[23] *See* Exs. 13 and 22.

Minnesota Public Utilities Commission – "particularly streamlined discovery and testimony through informational requests, pre-filed hearing testimony, and post-hearing briefing."[24]

Yet, even with this addition, these procedures would arguably provide less prehearing discovery than would be available in federal or state district court, or in contested cases governed by Part 1400 of Minnesota Rules (2015). For that reason, Comcast maintains that the NSCC hearing procedures (even as modified to include some practices used by the Minnesota Public Utilities Commission) violate guarantees of due process, the Cable Act, and the Minnesota Administrative Procedure Act.

II. Legal Analysis

The Due Process Clause of the Fourteenth Amendment protects individuals against governmental deprivations of "life, liberty or property" without due process of law.[25] The touchstone of due process is protection of the individual against arbitrary actions of government – whether this is through the unjustified exercises of state power or through official processes that are fundamentally unfair.[26]

Comcast maintains that a minimally fair process requires a more definite Notice and Order for Hearing, broader discovery proceedings and impleading the local franchising authorities as parties to this proceeding. Each claim is addressed below.

A. Sufficiency of the Notice and Order for Hearing

Comcast contends that the Notice and Order for Hearing violates its due process rights. Comcast maintains that the Notice fails to provide it with detail as to the basis for the LFAs preliminary decisions to deny renewal.

Parties must be notified of the issues to be raised at the hearing and that notice must be provided "at a meaningful time."[27] As the Minnesota Supreme Court explained in *Anderson v. Moberg Rodlund Sheet Metal Co.*, 316 N.W.2d 286 (Minn. 1982):

> 'The basic principle that a party is entitled to such notice as will provide reasonable opportunity to prepare is * * * clear * * *.' A trial-type hearing conducted in an adjudicative affair need not always have the panoply of a formal courtroom proceeding, but 'it is * * * fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it. Otherwise, the individual likely would be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided.' 'It goes without saying that the

[24] LETTER FROM COUNSEL at 1 (September 24, 2014).

[25] *See Board of Regents v. Roth*, 408 U.S. 564, 570–71 (1972); *Singleton v. Cecil*, 176 F.3d 419, 424 (8th Cir. 1999).

[26] *See County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

[27] *In re Ruffalo*, 390 U.S. 544, 550-551 (1968); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

> requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them.'[28]

In this case, the Notice and Order for Hearing sets forth three claimed shortcomings in Comcast's renewal proposal and Comcast's record of service as a cable operator. Pointing to the criteria under 47 U.S.C. § 546 (c)(1)(A), (B) and (D), NSCC maintains that Comcast has not substantially complied with the material terms of the existing franchise;[29] the quality of Comcast's service "including signal quality, response to consumer complaints, and billing practices" has not been reasonable in light of community needs;[30] and Comcast's renewal proposal is not "reasonable to meet the future cable-related community needs and interests …."[31]

Because Comcast had timely notice of the statutory basis for NSCC's claims, the documents that NSCC maintains support its allegations, and NSCC's declaration that Comcast's cable franchise should not be renewed, the Notice and Order for Hearing meets minimum constitutional standards.[32]

B. Due Process and the Limitations on the Hearing Rights

An essential principle of due process is that any deprivation of life, liberty or property must "'be preceded by [an] opportunity for hearing appropriate to the nature of the case.'"[33] In order to determine what hearing processes are "due" in a particular case, the U.S. Supreme Court has outlined a three-factor test. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court instructed lower courts to consider these factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[34]

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[28] *Anderson v. Moberg Rodlund Sheet Metal Co.*, 316 N.W.2d at 288 (citing *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 427 (1957), *Zotos International, Inc. v. Kennedy*, 460 F. Supp. 268, 274 (D.D.C.1978) and 3 K. Davis, *Administrative Law Treatise*, § 14.11 at 50 (2d ed. 1980)).

[29] NOTICE AND ORDER FOR HEARING at 4.

[30] *Id.* at 4-5.

[31] *Id.* at 5-7.

[32] *Schulte v. Transp. Unlimited, Inc.,* 354 N.W.2d 830, 834 (Minn. 1984) ("to be constitutionally sufficient, the notice must communicate the interest at stake"); *Comm'r of Nat. Res. v. Nicollet County Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 31 (Minn. Ct. App) *review denied* (Minn. 2001) ("Because Bode knew or should have known the consequences of a reversal of the hearings-unit decision and the interests at stake, the notice did not violate his due-process right").

[33] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted).

[34] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *accord Los Angeles v. David*, 538 U.S. 715, 716 (2003).

By addressing these factors, tribunals can determine whether the government has fulfilled the "fundamental requirement of due process" – namely, "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[35]

1. *Matthews* Factor One: The Private Interests Affected

In the view of the Administrative Law Judge, this factor does not favor any particular party. A multi-year franchise agreement for cable operations within the boundaries of the member cities represents a significant business opportunity for Comcast, to be sure, but it also implicates key operational interests of NSCC and could greatly impact service delivery to thousands of cable subscribers in the affected communities. For all concerned, this is an important case.

It is also true that the parties and tribunal have the time to develop a thorough record for decision-making prior to any decision on renewal of the franchise. Thus, the first factor does not significantly advantage one party over another.

2. *Matthews* Factor Two: The Value of Depositions and Additional Discovery in Avoiding Erroneous Deprivations

Comcast maintains that NSCC's limitations on production requests and prehearing depositions, "cut off Comcast's ability to elicit pertinent witness testimony from the people who arguably know the most about NSCC's reasons (illegitimate as they might be) for recommending that Comcast's renewal proposal be denied." For this reason, continues Comcast, the NSCC hearing rules "directly contravene due-process principles."[36]

The Administrative Law Judge disagrees. While Comcast outlines what it regards as sharp and unlawful business practices by the LFAs, this history is, for the most part, unrelated to the key issues in this proceeding. This is because the renewal criteria of the Cable Act are focused upon the offerings and performance of the *incumbent cable operator* – and not the wish-lists of local officials or stakeholders. As reflected in the House Report on the Cable Act:

> The purpose of [47 U.S.C. § 546 (c)] is to establish a process which protects the cable operator against an unfair denial of renewal by the franchising authority. It is intended that a cable operator whose past performance and proposal for future performance meet the standards established by this section be granted renewal. This protection is intended to encourage investment by the cable operator at the time of the initial franchise and during the franchise term. It will ensure such investment will not be jeopardized at franchise expiration without actions on the part of the operator justifying such a loss of business.

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[35] *Mathews*, 424 U.S. at 333.

[36] COMCAST'S INITIAL MEMORANDUM OF LAW at 27.

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> Finally, it is not intended that [47 U.S.C. § 546 (c)(1)(D)] requires the operator to respond to every person or group that expresses an interest in any particular capability or service. Rather, the operator's responsibility is to provide those facilities and services which can be shown to be in the interests of the community to receive in view of the costs thereof.[37]

The directives from Congress are plain: The administrative proceedings are to develop a hearing record on the cable operator's regulatory compliance history,[38] service history,[39] organizational capabilities[40] and renewal proposal.[41]

For that reason, even if Comcast could establish that local officials acted greedily or abusively during franchise negotiations,[42] those facts would contribute very little to a record for a "written decision granting or denying the proposal for renewal …."[43] Congress intends that the hearing process focus upon Comcast's service record and proposal.

The second factor weighs against requiring prehearing depositions or additional discovery beyond that which is reflected in both the NSCC resolution and its letter of September 26, 2014.

3. *Matthews* Factor Three: The Burden of Depositions and Additional Discovery

Because Congress intended to free incumbent cable operators from the burdens of rebutting "every person or group that expresses an interest in any particular capability or service,"[44] the administrative processes authorized by section 546 are likewise saved from cataloging and addressing each of these same demands. The evidence that Comcast needs to marshal at the evidentiary hearing relates to its regulatory compliance history, service history, organizational capabilities and the suitability of its renewal proposal. Presumably, the detail it needs to present relating to its service

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[37] H.R. REP. 98-934 at 72-74, 1984 U.S.C.C.A.N. 4655, 4709-11 (1984).

[38] 47 U.S.C. § 546(c)(1)(A).

[39] 47 U.S.C. § 546(c)(1)(B).

[40] 47 U.S.C. § 546(c)(1)(C).

[41] 47 U.S.C. § 546(c)(1)(D).

[42] COMCAST'S INITIAL MEMORANDUM OF LAW at 15-17.

[43] *See* 47 U.S.C. § 546(c)(3), (d); *Union CATV, Inc. v. City of Sturgis, Ky.*, 107 F.3d 434, 440 (6th Cir. 1997) ("[T]he operator is permitted at the administrative proceeding to introduce evidence challenging the necessity of the needs and interests previously identified by the franchising authority. The operator is also permitted to introduce evidence of the cost of providing such needs and interests. As indicated below, such evidence is necessary if the operator hopes to appeal successfully the denial of its renewal proposal to federal court.") (citations omitted).

[44] H.R. REP. 98-934 at 74, 1984 U.S.C.C.A.N. 4655, 4711.

record to customers living within the Member Cities, and the offerings it proposed to make available to these communities under a new franchise agreement, could, largely, be drawn from its own business records. In this context, extensive prehearing discovery or prehearing depositions are not needed in order to develop a record on the criteria listed in 47 U.S.C. § 546 (c).

The third factor weighs against requiring prehearing depositions or additional discovery beyond that which is reflected in both the NSCC resolution and its letter of September 26, 2014.

In light of the three *Matthews* factors, the result is clear: The due process guarantees of the Fifth and the Fourteenth Amendment do not require that cable franchisees be permitted to conduct prehearing depositions, or propound more than 20 interrogatories, in a renewal proceeding.

C. Discovery Limits and the Federal Cable Act

Comcast also argues additional discovery opportunities, including prehearing deposition practice, is required by the federal Cable Act. The Act provides in part:

> the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be afforded fair opportunity for full participation, including the right to introduce evidence…, **to require the production of evidence**, and to question witnesses. A transcript shall be made of any such proceeding.[45]

In Comcast's view, the terms "to require the production of evidence" includes the opportunity for prehearing depositions.

The Administrative Law Judge disagrees. The plain meaning of the terms "to require the production of evidence" connote the ability to compel the production of documents and interrogatory responses but not orders compelling a witnesses to provide out-of-court testimony for discovery.

Moreover, given Congress' role in publishing the Federal Rules of Civil Procedure,[46] it is doubtless aware of the features of discovery practice in the federal

[45] 47 U.S.C. § 546(c)(2).

[46] 28 U.S.C. §§ 2072–2074 (2013); *see also Amendments to the Federal Rules of Civil Procedure,* House Document 114-33, 114th Congress (May 15, 2015).

courts. Had Congress intended prehearing depositions to be features of the administrative process under the Cable Act, it would have made this point plain in the text of 47 U.S.C. § 546.[47]

With that said, it may be that the testimony of a particular witness is so central to a complete record on a statutory criterion that a subpoena compelling the attendance of that witness at the hearing is required in order to provide a "fair opportunity … to require the production of evidence" under section 546 (c)(2). While the Administrative Law Judge believes that such a circumstance would be very rare, it is not entirely unforeseeable. For this reason, Comcast's request for the opportunity to obtain subpoenas compelling the attendance of witnesses at the hearing is denied without prejudice to re-filing. If there are witnesses, not under its control, that have necessary detail relating to the section 546 (c)(1) criteria, Comcast may make a later application to compel their attendance at the hearing.

D. Discovery Limits and the Minnesota Administrative Procedure Act

Comcast maintains that additional discovery opportunities, including prehearing deposition practice, is required by the Minnesota Administrative Procedure Act (MAPA). Comcast points out, for example, that Minn. R. 1400.6900 "specifically allows depositions if the deposition would seek relevant information and the party shows good cause for the deposition."[48]

While Comcast accurately recounts the rule on preserving testimony through a prehearing deposition, this procedure is available in "contested cases"; a specific category of disputes under Minnesota law. Notwithstanding the importance of this controversy, it is not a "contested case" under state law. MAPA defines a "contested case" as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."[49]

In this case, NSCC is not an "agency" as defined by MAPA. An "agency" is a "state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the Tax Court, *having a statewide jurisdiction* and authorized by law to make rules or to adjudicate contested cases."[50]

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[47] *See, e.g., Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 693 (1975) ("[W]hen Congress enacted the Securities Exchange Act of 1934, it was fully aware of the well-established exchange practice of fixing commission rates, which had existed continuously since 1792. Nevertheless, Congress chose not to prohibit that practice."); *Bojorquez-Moreno v. Shores & Ruark Seafood Co., Inc.*, 92 F. Supp. 3d 459, 468 (E.D. Va. 2015) ("Congress is well aware of how to create a private cause of action in its enactments. If Congress chose not to do so, it is not for the courts to create one.").

[48] COMCAST'S INITIAL MEMORANDUM OF LAW at 27.

[49] Minn. Stat. § 14.02, subd. 3 (2014).

[50] Minn. Stat. § 14.02, subd. 2 (2014) (emphasis added).

This dispute, under the federal Cable Act, is properly before the Office of Administrative Hearings because of the authorization under Minn. Stat. § 14.55. This statute authorizes the Chief Administrative Law judge to provide "administrative law judges and reporters for administrative proceedings or informal dispute resolution" to a political subdivision that requests such assistance. The LFAs, and their designee, NSCC, are political subdivisions of the state.[51]

Not all of the disputes in which an Administrative Law Judge from the Office of Administrative Hearings is the hearing officer are "contested cases" under MAPA. A number of important disputes are resolved through procedures other than the "contested case" procedures found in Minn. R. 1400.5010-.8400.[52]

For these reasons, neither Minn. Stat. Ch. 14 (2014) nor Minn. R. 1400.6900 requires prehearing depositions or access to more than 20 interrogatories in a franchise renewal proceeding.

E. Permissive or Mandatory Joinder of the NSCC Member Cities

In its papers, Comcast argues that joinder of the member cities is both necessary and desirable. Comcast maintains that because its franchise agreements run between it and the member cities and not NSCC, the member cities are necessary parties to this proceeding.[53] Further, Comcast notes that the delegations from the various member cities to NSCC do not include the power to grant renewal of any of the franchises.[54] Comcast requests joinder of the cities as parties to the renewal proceeding "under the authority and principles of [Minn. R. Civ. P.] 19.01, 20.01, or 21."[55]

Minn. R. Civ. P. 19.01 obliges joinder of those persons who, if they were not included in proceedings, would impair a party's ability to protect an interest that is the subject of the dispute, or expose a party to the risk of inconsistent judgments.[56]

Minn. R. Civ. P. 20.01 authorizes the joinder of party-defendants if "any right to relief … arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."[57]

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[51] *See* Minn. Stat. §§ 1.26, subd. 1, 3.986, subd. 5, 238.08, subd. 5 (2014).

[52] *See, e.g.,* Minn. Stat. §§ 13.085, subd. 5, 211B.36, subd. 5, 216B.17, subd. 3 (2014); see also Minn. R. 1400.8505-.8612 (2015).

[53] COMCAST'S INITIAL MEMORANDUM OF LAW at 31-32.

[54] *Id*.

[55] *Id*. at 31, n.1.

[56] Minn. R. Civ. P. 19.01; *see generally, Shepard v. Stade,* No. A07-1220, 2008 WL 2246259 at *2 (Minn. Ct. App. 2008) (unpublished).

[57] Minn. R. Civ. P. 20.01.

Minn. R. Civ. P. 21 provides that "[p]arties may be dropped or added by order of the court ... at any stage of the action and on such terms as are just."[58]

The NSCC opposes joinder of the cities in these proceedings. It maintains that the Cable Act does not require the cities to participate in the hearing, pointing to the specific grant of hearing rights to either "the franchise authority, or its designee …."[59] Moreover, NSCC argues that its joint powers agreements with the member cities authorize it to act as the cities' agent during these proceedings.[60]

The Administrative Law Judge agrees. The Cable Act plainly contemplates that a designee of the local franchising authority may participate in the administrative proceedings on behalf of the franchising authorities.[61]

The case law confirms this conclusion. For example, in the case of *Comcast of California II, L.L.C. v. City of San Jose, Ca.,* 286 F. Supp. 2d 1241 (N.D. Ca. 2003), Comcast of California challenged the appointment of a hearing officer for the administrative proceedings that followed a negative preliminary assessment from the city of San Jose. Comcast of California asserted that the hearing procedures violated due process guarantees because Comcast would not present its evidence to the City Council in the first instance. The federal district court disagreed. It concluded:

> the [federal Cable Act] does not require that the 'franchising authority' in the form of the Council conduct the evidence gathering aspect of the administrative process, and indeed such a mechanism would make little practical sense. Moreover, the hearing officer is not granted unfettered discretion in making the recommendation to the franchising authority but is bound by the requirements set forth in the renewal standards of § 546(c) of the [Act].[62]

A like principle applies in this case. The LFAs should be permitted to participate in the assembly of a record for decision-making through the participation of an authorized agent – the NSCC. The federal Cable Act does not require joinder of the LFAs as party-Complainants, and such a result would "make little practical sense."

Moreover, there is genuine reason to doubt that an Administrative Law Judge has the power to join unwilling parties to an administrative proceeding. As Administrative Law Judge Bruce H. Johnson has observed: "Unlike judges of the district court who possess general jurisdiction, OAH's ALJs may only exercise such limited adjudicatory jurisdiction as the Legislature has conferred on them in a specific

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[58] Minn. R. Civ. P. 21.

[59] NSCC'S RESPONSE MEMORANDUM OF LAW at 25 (citing 47 U.S.C. § 546(c)(2)).

[60] *Id*. *See also,* Com. Mem., Exs. 23, 26, 29, 32, 35, 38, 41, 44, 47, 50.

[61] 47 U.S.C. § 546(c)(2).

[62] *Comcast of Ca. II,* 286 F. Supp. 2d at 1253.

statute."[63] Additionally, "the OAH rules do not contain a provision allowing an ALJ to order permissive or compulsory joinder of a third party" and none of the statutes authorizing a referral of this matter to OAH delegate this authority to the Administrative Law Judge.[64]

For all of these reasons, it is not appropriate to order joinder of the LFAs as party-complainants to this proceeding.

III. Conclusions

As the Administrative Law Judge noted at the oral argument on these motions, Comcast's requests for relief raise important questions of "floors and ceilings": The minimum "floor" requirements of the Due Process Clause, the federal Cable Act and MAPA, on the one hand, and the "ceiling" that the parties could create for themselves through a set of stipulations, on the other. Indeed, the hearing record in this case makes clear that there is a lot distance between the minimum procedural "floor" (provided by the underlying statutes) and the "ceiling" that could be created if the parties work collaboratively on an efficient hearing process.

The Administrative Law Judge restates his view (and that of Judge Neilson in the autumn of 2014[65]) that use of some of the hearing practices from the Minnesota Public Utilities Commission would permit the development of a hearing record on the Cable Act's renewal criteria in a fair, transparent and cost-effective manner. Use of these methods cannot be ordered by the Administrative Law Judge, but they could be agreed upon, in whole or in part, by the parties. These methods could enable the parties to assemble, condense and refine a voluminous hearing record for easy review by the LFAs, and if need be, by the state or federal courts.[66]

The subject of appropriate hearing procedures will, of course, recur at the next Prehearing Conference.[67]

E. L. L.

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[63] *In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth et al.,* No. 4-3600-20809-2, 2009 WL 6557806 *2 (OAH Oct. 20, 2009).

[64] *Id*.

[65] LETTER FROM COUNSEL at 1 (September 24, 2014).

[66] *See* 47 U.S.C. § 546(c)(3), (d).

[67] *See* FOURTH PREHEARING ORDER at 1, ¶ 6.